Federal Court  Cour fédérale

Date: 20220506

Docket: IMM-2383-20

Citation: 2022 FC 666

Ottawa, Ontario, May 6, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MANJIT SINGH DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Dhaliwal, seeks judicial review of the decision of a visa officer [The Officer], dated January 16, 2020, refusing his application for a work permit under the Temporary Foreign Worker Program, pursuant to section 200 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[2] For the reasons that follow, the application is dismissed.

I. Background

[3] Mr. Dhaliwal, a citizen of India, applied for a work permit pursuant to the Temporary Foreign Worker Program and the Intermediate-Skilled Program of the Atlantic Immigration Pilot Program [The Program] to work as a long haul truck driver in Canada.

[4] Mr. Dhaliwal had an offer of employment from White Rock Freight Services, in Moncton, New Brunswick.

II. The Officer's Decision

[5] By letter dated January 16, 2020, the Officer refused Mr. Dhaliwal's application because Mr. Dhaliwal was unable to demonstrate that he would be able to adequately perform the work he sought. The Officer's notes in the Global Case Management System [GCMS], along with the letter, constitute the reasons for the decision.

[6] The GCMS notes reflect the Officer's concern that Mr. Dhaliwal did not have sufficient English language proficiency to perform the work described in the relevant National Occupation Classification [NOC] for long haul truck drivers. The Officer considered Mr. Dhaliwal's International English Language Testing System [IELTS] scores, which showed an overall score of 5.0 and a score of 3.5 in reading, and found these to be low. The Officer noted that the British Council characterizes scores in the 3–4 range as "[e]xtremely limited users who convey and understand only general meaning in familiar situations. Frequent breakdowns in communication occur."

[7] Due to the Officer's concerns about the scores, the Officer interviewed Mr. Dhaliwal. The GCMS notes set out the Officer's questions, posed in English, and Mr. Dhaliwal's responses. Mr. Dhaliwal misunderstood several questions and was unable to respond at all to others. For example, he could not provide details of his past employment and he did not understand or respond to the Officer's questions about emergency assistance, i.e., a 911 call. The Officer then continued the interview in Punjabi.

[8] The Officer concluded:

> I expressed my concerns to the applicant that I am not satisfied that he can speak English sufficiently to converse with the general public and to independently handle any emergency situation that he may encounter while performing his course of duties. Applicant stated that he could use an interpreter. Informed him that the services of an interpreter may not be available to him at all times and therefore I am not satisfied that he would be able to perform his duties in Canada. Application refused on R200(3)(a).

III. The Standard of Review

[9] An officer's decision on an application for a temporary work permit is reviewed on the reasonableness standard: *Singh Grewal v Canada (Citizenship and Immigration)*, 2013 FC 627 at para 5 [*Singh Grewal*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16 [*Vavilov*].

[10] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at paras 85, 102, 105–07). The court does not assess the reasons against a standard of perfection (*Vavilov* at para 91). A decision should not be set aside unless it contains "sufficiently

serious shortcomings … such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

IV. The Applicant's Submissions

[11] Mr. Dhaliwal submits that the Officer's determination that he did not demonstrate sufficient proficiency in English is unreasonable on several grounds, including that:

- The Officer failed to follow the Immigration, Refugees and Citizenship Canada [IRCC] operational guidelines, elevated the language requirements beyond those set out by the Program, the NOC or the job offer, and failed to defer to the language requirements established by the Program;
- The Officer based the determination on perceived linguistic challenges in the community, which are irrelevant to the job requirements, contrary to the IRCC operational guidelines; and
- The Officer conducted the interview in an unreasonable manner that was not sensitive to the language requirements of the job or to Mr. Dhaliwal's linguistic abilities (i.e., at the Canadian Language Benchmarks [CLB] level 4); the Officer used complex and unfamiliar terms and sentence structure, and spoke quickly.

V. The Respondent's Submissions

[12] The Respondent submits that the Officer reasonably found that Mr. Dhaliwal had a very limited ability to communicate in English and, therefore, was unable to perform the work for

which he sought the temporary work permit. The Respondent notes that truck drivers must communicate in English (or French) with dispatchers and other drivers, maintain log books, record information and understand safety procedures and be able to respond in an emergency. These requirements are set out in the NOC and the Officer did not err in assessing Mr. Dhaliwal's language abilities in this context.

[13] The Respondent further submits that the Officer's assessment was not based on irrelevant considerations or elevated requirements. The Officer's assessment reflected the IRCC operational guidelines, although these are simply guidelines, and do not fetter the Officer's discretion.

[14] The Respondent adds that the IELTS scores alone would have justified the Officer's determination, and the interview confirmed that Mr. Dhaliwal had very little English language proficiency.

VI. The Decision Is Reasonable

[15] The Officer reasonably found that Mr. Dhaliwal had not demonstrated that he was able to adequately perform the work of a long haul truck driver due to his insufficient English language proficiency. No error can be found in the Officer's assessment or determination. The GCMS notes show the Officer's rational chain of analysis: simply that the relevant requirements for a long haul truck driver demand a sufficient level of English language proficiency that Mr. Dhaliwal did not demonstrate to the satisfaction of the Officer.

[16] Mr. Dhaliwal has attempted to dissect the Officer's decision with a view to suggesting that the Officer should have relied only on the Program requirements and IELTS or CLB scores and issued a work permit despite that the Officer's role is to determine whether a work permit should be issued and despite the impact that Mr. Dhaliwal's very limited English proficiency would have on his ability to perform the work of a long haul truck driver.

[17] Mr. Dhaliwal's main argument is that the Officer failed to follow the IRCC guidelines and elevated the language requirements beyond those set out in the Program or offer of employment.

[18] Mr. Dhaliwal submits that, in accordance with the IRCC's operational guidelines, the Officer should assess the language proficiency of applicants with regard to the NOC and job-specific requirements, including a Labour Market Impact Analysis [LMIA], where applicable, and that all other considerations are irrelevant. Mr. Dhaliwal notes that a long haul truck driver position is an "intermediate-skilled" job pursuant to the Program, requiring only a CLB level 4, or "basic proficiency." He submits that none of the tasks outlined in the NOC for long haul truck drivers require a higher level of proficiency. He adds that his IELTS scores, when converted to the CLB levels, met or exceeded CLB 4.

[19] Contrary to Mr. Dhaliwal's submissions, the Officer did not fail to observe the NOC or the relevant guidelines. The IRCC guidelines are not the law; they provide guidance, but do not fetter the exercise of the Officer's discretion.

[20] As noted by Justice Diner in *Brar v Canada (Citizenship and Immigration)*, 2020 FC 70 at para 10, in addressing the argument that an officer failed to comply with the IRCC guidelines:

> I do not agree with this submission. While the Officer does not need to be constrained – or fettered – by the Guidelines, and is primarily governed by the legislative requirements as set out in the *Immigration and Refugee Protection Act*, SC 2001, c 27 and Regulations, the Officer's Decision was nonetheless consistent with the points raised in these Guidelines: the Decision referenced the International English Second Language Testing System [IELTS] results, assessed Mr. Brar's language ability over the course of the interview, referred to the Labour Market Impact Assessment [LMIA] requirements and work requirements, and considered his English proficiency in the context of the work to be done. In fact, in the decision to interview Mr. Brar, the Officer noted "PA to be interviewed to assess his stated work experience and english [sic] abilities to be able to read safety instructions as PA's job involves a high risk to safety." The GCMS notes, as summarized above in paragraph 2 of these Reasons, provide a detailed indication of areas where the language fell short. The Officer concluded, based on these findings, that Mr. Brar would not be able to adequately perform the work sought.

[21] Visa officers are entitled to independently assess and exercise their discretion in determining whether an applicant is capable of performing the work duties; they are not bound by the NOC or LMIA (where applicable): *Singh Grewal* at para 17; *Sulce v Canada (Citizenship and Immigration*), 2015 FC 1132 at para 28.

[22] In *Singh v Canada (Citizenship and Immigration)*, 2022 FC 80, Justice Pamel noted at para 9:

> I accept that, following the decision in *Vavilov*, departure from past policy must be justified, however, Mr. Singh has not demonstrated that a policy existed to the effect that once an applicant meets the language requirement set out in either the NOC or the LMIA, the applicant must be admitted. To the contrary, the current policy – being the policy applied to Mr. Singh – is to give the visa officer the discretion to decide whether or not an applicant meets the

> language requirements using the IELTS results as well as the NOC and the LMIA as guidelines, not binding instruments. In any event, NOC 7511 sets out a number of duties expected of long-haul truck drivers – such as obtaining permits and other transport documents, and communicating via on-board computers – that would necessarily involve a certain level of reading skills. The fact that the Officer assessed the reading skills of an applicant independently of what the language tests would indicate does not seem unreasonable to me given the nature of the proposed position.
>
> [Emphasis added.]

[23] Mr. Dhaliwal relies on *Sarfraz v Canada (Citizenship and Immigration)*, 2019 FC 1578 [*Sarfraz*] in support of his submission that the Officer should defer to the Program, which requires the CLB 4 level.

[24] In *Sarfraz* at para 22, the Court stated:

> While a provincial or territorial nomination decision is owed deference on the government's assessment of applicable criteria, it is not binding on federal officers: *Chaudhry v Canada (Citizenship and Immigration)*, 2015 FC 1072 [*Chaudhry*] at para 28; *Sran v Canada (Citizenship and Immigration)*, 2012 FC 791 [*Sran*] at para 13. Officers must conduct their own analysis objectively, however, to achieve a consistent process [i.e. fair], taking into account their decision should not displace the underlying intent of the applicable program: *Roohi v Canada (Citizenship and Immigration)*, 2008 FC 1408 at para 31. Accordingly, any direct challenge to a provincial or territorial conclusion in the nomination process must be justified, transparent and intelligible: *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47.

[25] The jurisprudence, including *Sarfraz*, consistently acknowledges that a provincial nomination decision—in this case, the Program—is not binding. For example, in *Begum v Canada (Citizenship and Immigration)*, 2020 FC 162 [*Begum*], also relied on by Mr. Dhaliwal,

the Court again acknowledged that while Officers should give a “degree of deference” to provincial nominations, this is not binding (at para 26).

[26] In the present case, regardless of whether the CLB 4 level is identified as a benchmark for intermediate-skilled positions by the Program, the Officer was not bound to find this level to be sufficient. The Officer’s reasons for finding that Mr. Dhaliwal did not possess a sufficient level of English for the job are justified, transparent and intelligible.

[27] Although Mr. Dhaliwal argues that CLB 4 describes and acknowledges that the person communicates with “considerable effort,” the Program summarizes the requirements or attributes of the CLB 4 level, referred to as “basic proficiency,” as meaning that the person can:

- Take part in short, everyday conversations about common topics;
- Understand simple instructions, questions and directions;
- Use basic grammar, including simple structures and tenses; and
- Show that the person knows enough common words and phrases to answer questions and express themselves.

[28] The GCMS notes clearly support the Officer’s finding that Mr. Dhaliwal did not demonstrate a sufficient level of English language proficiency—or even the CLB level 4 proficiency as described above—for the job.

[29] I do not agree that the Officer elevated the job requirements by assessing Mr. Dhaliwal's language proficiency in the context of his ability to handle emergency situations, which he submits would be part of on-the-job training or orientation. Although some training would likely address particular emergency procedures, on-the-job training would not be expected to include language training. In addition to the duties set out in the NOC, including communicating with dispatchers and drivers, recording information, and understanding safety procedures, a long haul truck driver would need to be able to understand highways signs, which may warn of hazards, bad weather, detours, and directional signs. The inability to communicate and to understand such signs could have serious consequences, beyond the inability to call 911.

[30] *Randhawa v Canada (Citizenship and Immigration)*, 2006 FC 1294 at para 17, on which Mr. Dhaliwal relies and where the Court found that it was unreasonable for the Officer not to consider that some on-the-job orientation would be provided, is not analogous. In *Randhawa*, the issue was an assistant cook's lack of knowledge about local by-laws governing restaurants, which the Court found could be addressed with some orientation. A sufficient level of English and its impact on the duties of a long haul truck driver is an entirely different matter.

[31] Mr. Dhaliwal also points to *Tan v Canada (Citizenship and Immigration)*, 2012 FC 1079 at para 42 [*Tan*], where the Court found that the Officer unreasonably incorporated an elevated language requirement into the duties of a cook, who the Officer found would not be able to communicate with the relevant authorities in the case of accidents in the kitchen. Mr. Dhaliwal submits that *Tan* establishes that an officer errs by imposing requirements that are not set out in the NOC or the job offer. I do not agree that *Tan* establishes such a proposition as this could fetter the officer's discretion. Moreover, *Tan* is not analogous on its facts; Mr. Tan applied for permanent residence in the skilled worker category where his application was assessed with

reference to a points system. In the present case, the application is for a temporary work permit and the Officer has considerable discretion in determining whether the requirements are met, including language ability.

[32] Mr. Dhaliwal also relies on *Gill v Canada (Citizenship and Immigration)*, 2021 FC 934 at paras 23–28 [*Gill*], where the Court noted at para 25:

> While the Officer is not bound by the language requirements set by British Columbia and Canada for NOC 7511, the Officer must provide reasons that are intelligible, transparent and justified if they are to depart from that requirement (*Begum v Canada (Citizenship and Immigration)*, 2020 FC 162 ("*Begum*") at paras 26-27). In this case, the Officer provides no evidence for the proposition that an IELTS score level of 4.5 in reading is insufficient for the work sought by the Applicant, instead relying on conjecture that the Applicant's skills are insufficient, when both British Columbia and Canada say otherwise.

[33] Unlike the facts in several of the cases that Mr. Dhaliwal relies on in support of his submissions that the Officer erred by failing to defer to the Program and deviated from the benchmarks set out in the IELTS or CLB, including *Gill*, *Begum* and *Bano v Canada (Citizenship and Immigration)*, 2020 FC 568 (cited in *Gill*), the Officer conducted an interview to provide Mr. Dhaliwal with a further opportunity to demonstrate his English language proficiency. The GCMS notes reflect that Mr. Dhaliwal did not demonstrate sufficient English language proficiency and the Officer explained why this was not sufficient given the NOC requirements for a long haul truck driver.

[34] Contrary to Mr. Dhaliwal's submission, the Officer did not assess his language abilities based on irrelevant considerations such as communication challenges that he would face in the

community. The Officer stated, “I am not satisfied that he can speak English sufficiently to converse with the general public and to independently handle any emergency situation that he may encounter while performing his course of duties” [emphasis added]. While a long haul truck driver may not be required to routinely converse with the public as a job requirement, basic communication with the public would arise in the course of the duties along the route. Moreover, the Officer’s focus was on Mr. Dhaliwal’s ability to communicate as required by the NOC criteria, including in an emergency situation while performing his duties, which is essential to the job requirements as a long haul trucker.

[35] Mr. Dhaliwal also argues that the Officer’s assessment of his language proficiency was unreasonable because the Officer conducted the interview in a manner that set him up for failure, by using complex language and speaking quickly. Mr. Dhaliwal submits that the Officer should have tailored the questions to his language abilities at the CLB 4 level.

[36] In my view, such an approach could be counterproductive to the purpose of the interview, which was to assess Mr. Dhaliwal’s language abilities for the job that he sought and in the context of the NOC and all relevant considerations.

[37] Mr. Dhaliwal points to the Officer’s use of certain words, including “procure,” “job profile,” “air brake licence,” and “hypothetical situation.” While these terms may require a higher level of proficiency, Mr. Dhaliwal was also unable to respond to simple questions about the job he was seeking and his past employment, and to questions such as, “do you know about the general trucking industry in Canada” and “do you know about truck stops or gas stations in

Canada," all of which are very relevant questions for the job he sought. One of the Officer's main concerns was Mr. Dhaliwal's unfamiliarity with what to do in an emergency. The Officer's question "do you know the emergency number to call in Canada" is also simply worded and relevant. However, Mr. Dhaliwal did not respond at all. The request to make a "mock" 911 call may have been confusing to Mr. Dhaliwal, but the first part of that question was simpler—"Can you please try to speak a few lines in English…"—to which he did not respond.

[38] Mr. Dhaliwal points to *Azam v Canada (Citizenship and Immigration)*, 2020 FC 115 [*Azam*], in support of his submission that the Officer is not an expert in the assessment of language and elevated the language requirements beyond those of the program, NOC or offer of employment. In *Azam*, the Court found several errors in the officer's decision, including the assessment of the applicant's language proficiency. The Court noted that the officer discounted the IELTS scores because the officer was required to repeat and explain questions at the interview due to the applicant's misunderstanding of the questions.

[39] The Court stated at para 61:

> The misunderstanding of questions could arise in many ways. However, what the Officer does here is discount formal IELTS scores from tests that are specifically designed to test language ability in favour of her own assessment based upon having to repeat questions at the interview. The Officer does not explain precisely what questions were asked or provide actual responses, so I have no way of knowing if this amounted to any kind of meaningful test of the Applicant's abilities in English that could reasonably supplant formal IELTS scores. And, as with so many of the Officer's findings, there is no explanation of what the Applicant's English language ability has to do with the issue of whether she will leave Canada at the end of the work period.

[40] In the present case, the GCMS notes reflect the questions put to Mr. Dhaliwal and his answers or non-response. It is clear that Mr. Dhaliwal did not understand several questions, including simple questions. As noted above, the GCMS notes support the Officer's finding that Mr. Dhaliwal did not demonstrate even "basic proficiency" at the CLB 4 level. In addition, unlike *Azam*, the language requirement is relevant to the determination of whether Mr. Dhaliwal can perform the work he sought.

[41] In conclusion, the Officer reasonably concluded that Mr. Dhaliwal would be unable to perform the work of a long haul truck driver due to his insufficient level of English. The Officer's reasons are transparent and intelligible and are justified by the facts and the law.

JUDGMENT in file IMM-2383-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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